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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554



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| In The Matter of | ) | |
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| AT&T CONTRACT TARIFF NO. 360 | ) | Transmittal No . CT 3076 |
| | ) | CC Docket No. 95-146 |



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# COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION ON DIRECT CASE

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## SUMMARY

The substantial cause test should apply to any arrangement between a carrier and a customer to which the customer has committed itself and which the customer can not terminate without liability, regardless of whether the customer negotiated the arrangement or merely ordered service after the arrangement was made generally available, and regardless of whether the arrangement is contained in a Contract Tariff a Virtual Telecommunications Network Service ("VTNS") offering under Tariff 12, or in a term plan contained in a generic tariff. The substantial cause test is more, not less, critical to the evaluation of revisions to service offerings subject to streamlined regulation, since Commission scrutiny if such offerings is less than that of services subject to full regulation.

In applying the substantial cause test, far more is required than a showing that the carrier will lose money in the absence of the proposed revision. Proper application of the test requires consideration of carrier and customer interests and reference to contract law principles. The same standard should be applied to streamlined services as to fully regulated services, since the statutory reasonableness standard of Section 201(b) of the Communications Act remains the same.

Even if a carrier can demonstrate substantial cause for proposed tariff revisions, the affected existing customer should be permitted to terminate its long-term service arrangement without liability or should be exempted from the revised terms, since the revisions would materially affect the terms of the arrangement on which the customer has relied, and the customer has not consented to the revised terms. Carriers should not, however, be permitted to discriminate between customers by revising tariffed offerings and

grandfathering favored customers, while offering the same services to less favored customers on less favorable terms.

If a carrier demonstrates substantial cause and is permitted to revise existing tariffed terms and conditions, the revised tariff should be made generally available to similarly situated customers to avoid discrimination under Section 201(b).

The *Sierra-Mobile* doctrine provides an alternative basis for prohibiting unilateral revision by carriers of material terms of long-term arrangements absent a showing that the revision is in the public interest. This is so even if the terms of the carrier-customer agreement are filed with the Commission and made available to similarly situated customers.

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| In The Matter of | ) | |
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| AT&T CONTRACT TARIFF NO. 360 | ) | Transmittal No . CT 307 |
| | ) | CC Docket No. 95-146 |

# COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION ON DIRECT CASE

The Telecommunications Resellers Association ("TRA" or "Association"), by its attorneys, hereby submits its Comments on the Direct Case ("Direct Case") of AT&T Corp. ("AT&T"), filed in response to the Order Designating Issues for Investigation, DA 95-1934 (released September 8, 1995) ("Designation Order").

This proceeding raises important legal issues in the context of intriguing factual circumstances. The original customer of Contract Tariff ("CT") No. 360, Interworld Communications Corp. ("ICC"), has withdrawn its objections to CT No. 360, pursuant to a settlement with AT&T,[1/] and the sole remaining customer for that offering is MCI Communications Corporation ("MCI"), which ordered service under CT No. 360 subsequent to the filing of the Contract Tariff, but before AT&T filed the disputed Tariff

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1/ Letter from Shari Loe, AT&T, to David Nall Re: Transmittal No. 3076 (May 16, 1995) at 2, n.4; Direct Case at 1.

Transmittal No. 3076.[2/] Nevertheless, TRA submits these Comments in response to a number of significant legal questions raised by the Designation Order.

For the reasons set forth below, the Bureau should find that:

(1) the substantial cause test should apply to any long-term arrangement on which a customer has relied, regardless of the form of the arrangement or the fact that the arrangement is subject to streamlined regulation;

(2) the substantial cause test should include considerations of contract law and balancing of carrier and customer interests, and should not change for services subject to streamlined regulation;

(3) even if a carrier can demonstrate substantial cause for proposed tariff revisions, the affected existing customer should be permitted to terminate its long-term service arrangement without liability or should be exempted from the revised terms, since the revisions would materially affect the terms of the arrangement on which the customer has relied, and the customer has not consented to the revised terms;

(4) if a carrier demonstrates substantial cause and is permitted to revise existing tariffed terms and conditions, the revised tariff should be made generally available to similarly situated customers; and

(5) the *Sierra-Mobile* doctrine provides an alternative basis for prohibiting unilateral revision by carriers of material terms of long-term arrangements absent a showing that the revision is in the public interest.

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[2/] CT No. 360 became effective in September, 1993; MCI ordered service under the Contract Tariff in early December, 1994; and AT&T filed Transmittal No. 3076 on February 6, 1995. Direct Case at 2-3.

# I.

# INTRODUCTION

The Commission applies the "substantial cause test"[3/] to determine whether a proposed revision to a long-term service arrangement is just and reasonable under Section 201(b) of the Communications Act, 47 U.S.C. § 201(b). If the proposed revision materially alters the terms of the arrangement, the carrier must demonstrate substantial cause for the change or the proposed revision will be found to be unjust and unreasonable.

The position of the existing customer(s) is critical to the substantial cause analysis, and if a proposed revision materially alters the long-term arrangement on which the customer relied, and the customer has failed to consent to the revision, the revision will be found to be unjust and unreasonable unless the carrier can demonstrate substantial cause for the revision. As long as a customer has committed to a long-term arrangement with the reasonable expectation that, as a *quid pro quo* for its commitment, the terms and conditions of service will remain stable, it should be irrelevant for purposes of applying the substantial cause test whether the customer negotiated the original tariff terms with the carrier or merely relied on them when it committed to a term plan.

If a carrier is required to show substantial cause for a proposed tariff revision, it will be insufficient for the carrier to show mere economic loss. It is appropriate in applying the test to look to the interests of customers as well as to principles of contract law which include unforeseeability, frustration of purpose, and impossibility of performance.

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3/ RCA American Communications, Inc., 84 F.C.C.2d 353, 357 (1980) ("RCA Americom Investigation Order"); Showtime Networks, Inc. v. FCC, 932 F.2d 1, 6 (D.C. Cir. 1991).

Even if a carrier is able to demonstrate substantial cause for revisions to a long-term service arrangement, a customer may terminate the arrangement without liability or be exempted from the revised terms if its rights and obligations under the revised tariff would materially differ from those to which it originally committed and if the customer failed to agree to the proposed revisions.[4/] AT&T essentially recognized this right when it permitted ICC, the original customer of CT No. 360, to terminate its arrangement under CT No. 360 without liability after AT&T filed Transmittal No. 3076.

If a carrier is able to demonstrate substantial cause, and a tariff revision is allowed to take effect, the revised tariff should be made generally available to similarly situated customers. Failure to do so would constitute unreasonable discrimination under Section 201(b) of the Communications Act.

Finally, the *Sierra-Mobile* doctrine prohibits carriers from unilaterally altering by tariff material terms of long-term service arrangements with carrier-customers, without their consent, unless such changes are in the public interest, even if such terms are contained in filed tariffs.

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4/ Competition in the Interstate Interexchange Marketplace, CC Docket 90-132, 10 F.C.C. Rcd. 4562 (1995); AT&T Communications – Revisions to Tariff F.C.C. No. 1, Transmittal No. 8640 (Com. Car. Bur. July 11, 1995); AT&T Communications – Revisions to Tariff F.C.C. No. 2, Transmittal No. 2, 6 F.C.C. Rcd. 5304 (Com. Car. Bur. 1991).

# II.

# ARGUMENT

## A. The substantial cause test applies to any unilateral carrier alteration of a long-term service arrangement on which a customer has relied, regardless of the form of the arrangement and regardless of streamlined regulation.

The "substantial cause" test (also known as the "substantial cause for change" test) seeks to "ascertain reasonableness where a carrier provides service under a comprehensive, contract-like tariff scheme, and later seeks to modify material provisions during the term specified in the tariff."[5/] The test is applied even where a carrier's tariff broadly reserves the right to the carrier to change the terms and conditions of the tariff during the term.[6/]

The Commission has recognized that, in applying the test, its "statutory responsibilities dictate that we take into account the position of the relying customer in evaluating the reasonableness of the change."[7/] Thus, the determination of reasonableness "involves considerations of fairness to carrier and customer alike."[8/] More specifically, the test asks whether the business needs and objectives of the carrier (and/or the injury to the carrier which the tariff revision is designed to prevent) outweigh the customer's loss of its legitimate expectation of commercial certainty and stability.[9/]

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5/ RCA American Communications, Inc., 86 F.C.C. 2d 1197 (1981) ("RCA Americom Suspension Order") at 1201.

6/ Id. at 1202.

7/ Id. at 1201.

8/ RCA Americom Investigation Order, 84 F.C.C.2d at 356.

9/ See AT&T Communications – Revisions to Tariff F.C.C. No. 2, 5 F.C.C. Rcd. 6777 at 6779, ¶¶ 16, 21 (Com. Car. Bur. 1990).

At the heart of the substantial cause test are notions of customer reliance, commercial stability, contract law, and fundamental fairness. The primary inquiry in applying the substantial cause test is whether the proposed revision would materially alter the stability of the contractual relationship and the legitimate expectations of the customer.

It is clear from Commission precedent that the significant issue in applying the substantial cause test is not the form of the arrangement between carrier and customer, but whether a long-term arrangement exists in which the customer has a reasonable expectation of stability. For example, in Policy and Rules Concerning Rates for Dominant Carriers, 4 F.C.C. Rcd. 2873 (1989), the Commission wrote that

> we developed the substantial cause test as a tool for evaluating tariff changes in a circumstance in which customers had a legitimate expectation that the change would not occur. In RCA American Communications, the carrier created such an expectation in a few identifiable customers when it offered service for a fixed term. The contract-like offering of a long term tariff is not, however, the only way in which legitimate expectations of rate stability can be created. In our price caps plan, it is this Commission that creates for ratepayers the legitimate expectation that, in general, rates will decrease in real terms from the levels they could expect under rate of return.

Id. at ¶ 474 (emphasis added).

And in RCA American Communications, Inc. -- Revisions to Tariff F.C.C. Nos. 1 and 2, 2 F.C.C. Rcd. 2363 (1987), the Commission stated, with respect to a generally available tariff offering, that "customers are entitled to rely on stability in material provisions of tariffs that offer service for extended terms. . . ." Id. at ¶ 26.

In the RCA Americom Investigation Order, 84 F.C.C.2d at 357, the Commission articulated the hallmarks of long-term service arrangements to which application of the substantial cause test is appropriate:

> The long term service arrangements found in RCA Americom's current tariff bear similarities to service contracts often entered into by unregulated firms. The carrier offers definite terms for a fixed period, most likely after negotiations with potential customers; the customers then decide whether to accept the offer based upon whether the offering meets their needs at a price they are willing to pay. The rates and the length of service term would of course be among the most important terms for customers. In this case, the question is raised as to whether customers have chosen RCA Americom's service because of those terms, and relied upon its terms in contracting with their own customer, as well as in making investments and other business decisions.

(Emphasis added.) Significantly, the Commission did not state that negotiation between the carrier and the customer was a prerequisite to application of the test, only that it would "most likely" have occurred in the context of a long-term arrangement. More important are that the carrier has offered definite terms for a fixed term and that the customer has relied on those terms in deciding to commit to the terms of the arrangement. These factors would trigger application of the test whether the customer committed to a long-term arrangement contained in a Contract Tariff (either as the original customer or otherwise), a Virtual Telecommunications Network Service ("VTNS") offering under AT&T's Tariff 12, or a term plan under a more generic tariff offering.

The substantial cause test is premised on the Commission's recognition that stability and predictability are critical to long-term carrier/customer relationships, as explained in the RCA Americom Investigation Order at 358-59:

> [A] carrier's proposal to modify extensively a long term service tariff may present significant issues of reasonableness under Section 201(b) of the Act which are not ordinarily raised in other tariff filings. In our judgment, the right of a carrier to change its tariff unilaterally should be viewed in a different light when the tariff itself represents, in large measure, a quasi-contractual agreement between the carrier and the customer. We have recognized in the Competitive Carrier Rulemaking the benefits which contracts bring to the carrier-customer relationship. The private negotiation process will generally, in the absence of market power, conclude in a more

> efficient bargain than that which our regulatory process would artificially impose. Contracts also lend certainty to the process. In contrast, any commitment reflected in a tariff would be fully binding on the customer as a matter of law (Section 203, 47 U.S.C. §203) yet the carrier would remain free to change the terms of the service offering at any time. It strikes us as anomalous that a carrier could use the tariff filing process to prevent any of its service terms from being enforced against it by customers, while at the same time bind customers to all the tariff provisions for as long as the carrier wishes until expiration of the terms by operation of the tariff itself. In effect, then, the result would be an agreement that only one of the contracting parties could enforce.

Id. (emphasis added). The Commission discusses the Competitive Carrier Rulemaking, which streamlined regulation of nondominant carriers, yet it does not suggest that the substantial cause test would not apply to offerings subject to streamlined regulation. On the contrary, the Commission implicitly affirms the applicability of the substantial cause test to offerings that are subject to streamlined regulation, including contracted-for terms that are contained in filed tariffs.

The Commission expressly endorsed application of the substantial cause test to carrier-customer contracts embodied in tariffs, specifically, to AT&T's Contract Tariffs, when it stated:

> In applying the substantial cause test to AT&T's contract-based tariff modifications, we will consider that the original tariff terms were the product of negotiation and mutual agreement. We believe that the fact that AT&T and the customer chose to do business via a contract-based tariff and not a generic tariff should carry certain consequences. As we observed in the Notice of Proposed Rulemaking in this proceeding, one benefit of contract carriage is that it can facilitate planning by both users and [interexchange carriers] through greater availability of long-term commitments and price protection. This benefit would be reduced if AT&T was unilaterally able to alter material terms of their contracts.[10/]

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10/ Competition in the Interstate Interexchange Marketplace (Order on Reconsideration), 7 F.C.C. Rcd. 2677 (1992) at ¶ 25 (footnote omitted) (emphasis added).

Even if a customer did not negotiate the original terms of a Contract Tariff, the fact that it "chose to do business via a contract-based tariff and not a generic tariff should carry certain consequences," to borrow the Commission's words. In such circumstances, as long as the customer has committed to a definite term, it should be entitled to rely on the stability of the rates and other terms and conditions it agreed to during the term.

Indeed, the Commission has previously applied the substantial cause test to generic tariff offerings under which customers and carriers committed to long-term service relationships, even though the customers of those arrangements did not negotiate the original tariffed terms.[11/]

Customers of long-term service arrangements, particularly resellers, rely on the stability and predictability of the terms of their long-term arrangements in entering into agreements, many of them long-term, with *their* customers and with other parties with which they do business. Because they have relied on the terms of their arrangements with a carrier in negotiating terms with their customers and other parties with which they do business, their businesses can be severely disrupted (or worse) if the carrier is permitted to change the terms of their long-term arrangements without their consent. Regardless of the nature of the change, a material change itself requires reseller customers to adjust their projected expenses, revenues, profits, and often, customer contracts, and it results in their incurring unexpected administrative costs, and potentially losing customers. Reseller customers therefore rely on the substantial cause test as a litmus test to evaluate the

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11/ *E.g.*, AT&T Communications, Revisions to Tariff F.C.C. No. 2, 5 F.C.C. Rcd. 6777 (Com. Car. Bur. 1990) (even though long-term arrangements were not contained in individually negotiated contract tariffs, but in generally available tariffs, proposed revisions to those arrangements were rejected because AT&T failed to show substantial cause).

necessity of tariff revisions and to enforce the stability and predictability of long-term service arrangements.

In a streamlined environment, application of the substantial cause test is more, not less, critical to ensuring fairness in carrier/customer relationships, since Commission scrutiny of offerings subject to streamlined regulation is less than that of fully regulated services.

AT&T has incorrectly asserted that

> there is only a basis for infringing upon a carrier's right to select or alter the terms upon which it chooses to do business if the carrier, within the tariff, creates a reasonable expectation that it has made a commitment, supported by mutual undertakings of carrier and customer, not to alter those terms.

Direct Case at 7-8.

Although it is critical to application of the substantial cause test that the customer invoking the test have a legitimate expectation of stability of the terms of the arrangement, it is irrelevant whether that expectation arose from the tariff or from some other source. Indeed, customer reliance can be presumed.[12/]

AT&T has admitted that

> [i]n most generally available tariff offerings, no mutuality of commitment exists, and the carrier should remain free to alter the terms of its offerings as it chooses, just as the customer remains free to cease taking service as it so chooses. However, in circumstances where the customer reasonably has relied on a carrier's existing terms in signing up for a fixed period or volume of service, and has through its commitment given up its right to walk away, it is appropriate to expect the carrier to carry a heavy burden of demonstrating that it nevertheless is commercially reasonable to "change the deal.

Direct Case at 8 (footnote omitted) (emphasis added).

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12/ Policy and Rules Concerning Rates for Dominant Carriers, 4 F.C.C. Rcd. 2873 (1989).

AT&T is half correct. Where a customer has committed to a long-term arrangement[13/] – regardless of the form of the arrangement – a carrier should be required to demonstrate substantial cause before it can alter the terms of that arrangement; however, substantial cause, in such a case, must be a standard significantly stricter than the "commercial reasonableness" standard AT&T proposes.

### B. The substantial cause test should include considerations of contract law principles and balancing of carrier and customer interests, and should not change for services subject to streamlined regulation.

#### 1. Contract law principles.

The substantial cause test is applied on a case-by-case basis. While considerations of customer fairness and reliance have long been the touchstone of the test, recently the Commission has recognized that contract law principles, which themselves are based on considerations of fairness for both contracting parties, are instructive in applying the test. Thus, when it recently explained how it would apply the substantial cause test to evaluate unilateral revisions by AT&T of Contract Tariff terms, the Commission wrote:

> Given the special nature of contract-based tariffs, we believe that commercial contract law principles are highly relevant to an assessment of whether a contract-based tariff revision is just and reasonable under the substantial cause test. We are not prepared, however, to say at this time that these principles provide definitive parameters for a substantial cause showing. Instead, we

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13/ As to what duration an arrangement should have to be deemed "long-term," AT&T itself has admitted that a three-year commitment is sufficiently long-term to constitute an arrangement revision of which requires a showing of substantial cause. See Reply of AT&T Corp. filed February 16, 1995, in this proceeding, at 6, n. 9. TRA submits that any relationship with a carrier that the customer can not terminate without liability is a relationship that can not be materially altered by the carrier without a showing of substantial cause.

> will consider on a case-by-case basis in light of all relevant circumstances whether a substantial cause showing has been made.[14/]

Examples of contract law principles which would seem to be applicable to unilateral carrier attempts to change material terms of long-term service arrangements include the doctrines of impossibility of performance, frustration of purpose, and commercial impracticability, all of which require the party asserting them as a defense to non-performance of its contractual obligations to show that extreme unforeseeable circumstances arose which prevented the party from performing under the original terms of the agreement.[15/]

2. Carrier interests.

As noted previously, application of the substantial cause test involves considerations of carrier interests as well as customer interests. With respect to carrier interests, it is well established that mere loss by the carrier of anticipated revenues is generally insufficient to satisfy the substantial cause test. Indeed, when AT&T attempted to assert such a justification for tariff revisions restricting customers' ability to switch from costly long-term plans to less expensive long-term plans, the Common Carrier Bureau rejected the proffered explanation, stating:

> AT&T's second assertion in support of its substantial cause claim is a conclusory statement that it will lose revenues if the transmittal does not take effect. We note that AT&T is claiming that its revenues will be reduced; it is *not* claiming that it will fail to recover its costs or that net revenues will be negative. . . . To the extent that AT&T is arguing that it will make less money when customers take advantage of the lower tariffed rate in the plan

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14/ Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Memorandum Opinion and Order on Reconsideration, FCC 95-2 (released February 17, 1995) ("Interexchange MO&O on Reconsideration") at ¶ 25 (footnote omitted).

15/ See 18 S. Williston & W. Jaeger, Williston on Contracts (3d ed. 1978) at 1, et seq.; Restatement (Second) of Contracts (1979) §§ 261, et seq.

> to which they convert, it has failed to identify some injury to AT&T that outweighs the existing customers' legitimate expectation of stability . . . . [16/]

Thus, a carrier will be required to demonstrate significantly greater harm or difficulty performing its obligations under the original terms of the arrangement to sustain a showing of substantial cause. Common law contract law principles, to which the Commission now looks for assistance in applying the substantial cause test, are consistent with this approach. For example, the common law rule of impossibility of performance excuses a party's performance of its contractual obligations only if

> the promised performance was at the making of the contract, or thereafter became, impracticable owing to some extreme or unreasonable difficulty, expense, injury, or loss involved . . . . [or to] an unanticipated circumstance [that] has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract.[17/]

Not only has the Commission observed with respect to AT&T and other carriers that a carrier can not justify terminating or altering a long-term arrangement solely on the basis of a reduced expectation of return, but such a rule is consistent with common law contract principles:

> The fact that by supervening circumstances, performance of a promise is made more difficult and expensive, or the counterperformance of less value

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16/ AT&T Communications – Revisions to Tariff F.C.C. No. 2, 5 F.C.C. Rcd. 6777 (Com. Car. Bur. 1990) at 6779, ¶ 21. The Bureau rejected AT&T's claim that the tariff revisions were "clarifications" rather than revisions, explaining that "restrictions on termination of existing plans and initiation of new plans are significant aspects of a long term service plan and cannot be changed without impact on the customer." Id. at 6778-79, ¶ 15.

17/ 18 S. Williston & W. Jaeger, Williston on Contracts (3d ed. 1978) ("Williston") at 6-8.

> than the parties anticipated when the contract was made, will ordinarily not excuse the promisor.[18/]

Similarly, the Restatement (Second) of Contracts states that "mere market shifts or financial inability do not usually effect discharge under the [rule of impossibility of performance]."[19/]

Thus, while the substantial cause is a fluid device to be applied on a case-by-case basis, in considering the interests of the carrier seeking to modify existing terms of a long-term arrangement, the Commission should demand significantly more than a mere showing that the terms the carrier seeks to change would not be as lucrative to the carrier as the proposed revised terms. Instead, the Commission should require proof of unforeseen circumstances that would make the carrier's performance of its original obligations impracticable or extremely or unreasonably difficult as the threshold for substantial cause.

3. Customer interests.

Although customer reliance on the stability of long-term arrangements is a prerequisite for application of the substantial cause test, traditionally it has not been necessary for customers to demonstrate detrimental reliance as part of the substantial cause balancing test of carrier and customer interests. Thus, in RCA American Communications, Inc. -- Revisions to Tariff F.C.C. Nos. 1 and 2, 2 F.C.C. Rcd. 2363 (1987), the Commission stated:

> RCA Americom appears to believe that its customers must prove detrimental reliance in order for the carrier to be, in effect, estopped from altering its tariff terms in midstream. We have never so held. Rather, the basis of the substantial cause test is the apparent unfairness of allowing a carrier to alter material provisions of a long-term tariff when customers have agreed to take service under the understanding that, by offering such terms, the carrier has sacrificed some of its traditional flexibility to revise its tariff at any time.

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18/ Williston at 176.

19/ Restatement (Second) of Contracts (1979) ("Restatement 2d") § 261, note b.

Id. at note 27 (emphasis added).

Similarly, in Policy and Rules Concerning Rates for Dominant Carriers, 4 F.C.C. Rcd. 2873 (1989), the Commission wrote that

> there is nothing inherent in a substantial cause requirement that demands that we be able to individually analyze the reliance interests of identifiable customers. Indeed, since we are intentionally creating [in price caps], for ratepayers as a general class, the general expectation of rates that do not exceed the upper bands, we may presume that they rely on that general expectation. We do not expect the nature and extent of customer reliance typically to be at issue in investigations of above-band rates.

Id. at ¶ 475.

Thus, while some demonstration of customer reliance on stable terms and conditions of service is required for the substantial cause balancing of interests, a showing of detrimental customer reliance is not a prerequisite.

### 4. The "reasonableness" standard has not changed.

AT&T has argued that "as the Commission has moved from traditional to streamlined regulation of competitive services, the standard for whether a tariff falls within the zone of reasonableness also changes." Direct Case at 6. AT&T's argument assumes that the Commission has somehow lessened the standard of reasonableness contained in Section 201(b) of the Communications Act, which it not only has not, but can not, do.

As the U.S. Court of Appeals for the Second Circuit wrote in AT&T v. FCC,[20/]

> [t]he FCC has a duty 'to execute and enforce the provisions of' the Communications Act . . . . The Communications Act requires that common carriers furnish service on reasonable request, 47 U.S.C. § 201(a); [and] that rates and practices be just, fair, reasonable, and nondiscriminatory, 47 U.S.C. §§ 201(b), 202(a) . . . . We are aware of no authority for the proposition

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20/ 572 F.2d 17, 25 (2d Cir.), cert. denied, 439 U.S. 875 (1978).

> that the FCC may abdicate its responsibility to perform these duties and ensure that these statutory standards are met.

In that litigation, the Commission stated to the Court of Appeals that

> [t]he Commission has affirmative commands from Congress to ensure that rates are just, reasonable, and nondiscriminatory. . . . The agency has no authority to ignore these commands, even if market forces arguable are present which undercut the 'natural monopoly' justification for regulation . . . .[21/]

The Commission itself has recognized on numerous occasions that the substantive requirements of the Communications Act, particularly Sections 201 and 202, apply to non-dominant carriers to the same extent that they apply to dominant carriers.[22/] Indeed, in Competition in the Interstate Interexchange Marketplace, Order on Reconsideration, which AT&T selectively quotes,[23/] the Commission acknowledged that while

> there should be few incidents . . . of unilateral, material revisions to a contract deal . . . [because of competitive forces,] [n]evertheless, we provide the following elaboration of how we intend to apply the substantial cause test in the unlikely event that a carrier seeks to make a unilateral change in a contract-based tariff.[24/]

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21/ Brief of FCC at 49-50 (quoted in MCI Telecommunications Corp. v. FCC, 765 F.2d 1186, 1193 (D.C. Cir. 1985)).

22/ See In the Matter of Policy and Rules Governing Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Notice of Inquiry and Proposed Rulemaking, 77 F.C.C.2d 308, 335 (1979); First Report and Order, 85 F.C.C.2d 1, 4, 18 (1980); Second Report and Order, 91 F.C.C.2d 59, 69 (1982); Fourth Report and Order, 95 F.C.C.2d 554, 556 (1983); Fifth Report and Order, 98 F.C.C.2d 1191, 1192 (1984).

23/ According to AT&T, the Commission sees less likelihood that carriers will unilaterally alter the terms of streamlined offerings, since competitive pressures will prevent the carriers from doing so. Direct Case at 7, n. 24. AT&T's own unilateral modification of its Contract Tariff offerings, which are subject to streamlined regulation, are proof that competitive pressures are insufficient to limit or prevent such carrier conduct.

24/ Id., 10 F.C.C. Rcd. 4562, 4573.

The Commission went on to explain that it would look to principles of contract law, "in light of all relevant circumstances" to determine whether the carrier proposing revisions has demonstrated substantial cause.[25/]

Thus, the standard for determining reasonableness under Section 201(b) of the Communications Act remains unchanged, and there is no basis for altering the tool the Commission uses to measure reasonableness, the substantial cause test, with respect to contract-based tariffs or other long-term service offerings subject to streamlined regulation.

C. **Even if a carrier can demonstrate substantial cause for proposed tariff revisions, the affected existing customer should be permitted to terminate its long-term service arrangement without liability or should be exempted from the revised terms, since the revisions would materially affect the terms of the arrangement on which the customer has relied, and the customer has not consented to the revised terms.**

If a carrier is able to demonstrate substantial cause for its attempted unilateral alteration of a long-term service arrangement, and the proposed revisions would result in a material readjustment of the relative rights, obligations, and expectations of the customer and carrier to which the customer has not consented, it would be fundamentally unfair to require the customer to remain bound to long-range terms and conditions to which it did not agree. Furthermore, if the revisions are permitted, the carrier would be encouraged to make future material alterations to its arrangement with the customer that could be very detrimental to the customer and its relationships with its own customers.

For these reasons, if a carrier is permitted to alter unilaterally a long-term service arrangement with a customer, the carrier should either "grandfather" the customer, *i.e.*, exempt it from the revisions, or permit the customer to terminate its commitment to the

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25/ Id. at 4574.

carrier without liability. Either alternative would be consistent with Commission precedent.

The Commission has recently indicated in CC Docket 90-132 that, under some circumstances, it would permit customers of AT&T long-term service arrangements to terminate those arrangements if AT&T attempted to alter material terms of those arrangements without their consent, ***even if AT&T were able to demonstrate substantial cause for the alteration.***[26/] The Commission explained:

> In applying the substantial cause test to AT&T's contract-based tariff modifications, we will consider that the original tariff terms were the product of negotiation and mutual agreement. We believe that the fact that AT&T and the customer chose to do business via a contract-based tariff and not a generic tariff should carry certain consequences. As we observed in the Notice of Proposed Rulemaking in this proceeding, one benefit of contract carriage is that it can facilitate planning by both users and IXCs through greater availability of long-term commitments and price protection. This benefit would be reduced if AT&T was unilaterally able to alter the material terms of their contracts. Given the special nature of contract-based tariffs, we believe that commercial contract law principles are highly relevant to an assess of whether a contract-based tariff revision is just and reasonable under the substantial cause test. . . . In the unlikely event that a material change to a contract-based tariff meets the substantial cause test, we will . . . consider on a case-by-case basis whether to permit customers taking service under that contract-based tariff to terminate their contract.[27/]

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26/ Competition in the Interstate Interexchange Marketplace, CC Docket 90-132, 10 F.C.C. Rcd. 4562 (1995) ("Interstate Interexchange MO&O on Reconsideration") at 4574, ¶ 25.

27/ Id. at 4574, ¶ 25 (emphasis added; footnotes omitted).

Moreover, there is ample precedent simply to grandfather a customer and exempt it from the proposed tariff revisions.[28/]

Either approach -- grandfathering or permissive termination without liability -- would be consistent with principles of economic theory, contract law, and fundamental fairness.[29/] The stability of long-term contractual terms and conditions is an important element of the bargain which long-term customers expect when they commit to extended service plans. If that element is removed without their consent, optional termination of their arrangements without liability (or grandfathering) is an appropriate remedy for customers that believe that the benefits of the bargain no longer outweigh the risks. Of course, some customers may decide to continue with the arrangements, notwithstanding the lack of stability of the terms of those arrangements.

As a matter of economic theory, the economic benefits of contracts derive from the stability and predictability that they bring to the market, but such benefits require that the contracts are equally binding on both parties. If a carrier is free to alter materially the terms of its long-term arrangements, then its existing customers should be free to terminate those arrangements without liability or be exempted from the revised terms.

Finally, either of the proposed resolutions, though less than desirable, would be a balanced, equitable approach which would represent a thoughtful balancing of the supposed

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28/ *E.g.*, AT&T Communications - Revisions to Tariff F.C.C. No. 1, Transmittal No. 8640 (Com. Car. Bur. July 11, 1995); AT&T Communications - Revisions to Tariff F.C.C. No. 2, Transmittal No. 2, 6 F.C.C. Rcd. 5304 (Com. Car. Bur. 1991).

29/ This statement is subject to one important caveat: A carrier should not be permitted to combine revision of its service offerings with grandfathering of preexisting customers to effectuate discriminatory pricing with respect to different classes of customers, such as commercial users and resellers.

(though not demonstrated) business needs of the carrier against customer considerations of fairness, stability, and predictability, all of which are permissible considerations in the determination whether a carrier's acts or practices are reasonable under the substantial cause test and Section 201 of the Act.

### D. If a carrier demonstrates substantial cause and is permitted to revise existing tariffed terms and conditions, the revised tariffed should be made generally available to similarly situated customers.

It is fundamental that carriers can establish the rates and terms of service by contract only if they file those rates and terms with the Commission and make them generally available to other similarly situated customers. MCI Telecommunications Corp. v. FCC, 917 F.2d 30, 38 (D.C. Cir. 1990); Competition in the Interstate Interexchange Marketplace, 6 F.C.C. Rcd. 5880, 5903 (1991); *see* Ad Hoc Telecommunications Users Committee v. FCC, 680 F.2d 790 (D.C. Cir. 1982). While a Contract Tariff must be made generally available during a limited window of opportunity following its initial filing, the Bureau should affirm that, if it is materially revised pursuant to a showing of substantial cause, it should again be made available, as revised, to all customers ready, willing, and able to meet the terms and pay the rates of the revised offering. To do otherwise would be to violate the nondiscrimination requirement of Section 202(a) of the Communications Act.

### E. The *Sierra-Mobile* doctrine provides an alternative basis for prohibiting unilateral revision by carriers of material terms of long-term arrangements absent a showing that the revision is in the public interest.

Under the so-called "*Sierra-Mobile* doctrine," a common carrier -- whether it be a communications carrier, a gas pipeline provider, or an electrical utility -- may not use a

tariff to revise unilaterally the terms of a legitimate contractual service arrangement absent a showing that the revision is in the public interest.[30/]

In Bell System Tariff Offerings,[31/] the Commission endorsed this fundamental principal, stating:

> Bell cannot supersede, modify or terminate its contracts with Western Union merely by filing tariffs or taking other unilateral action. In light of the court decisions interpreting comparable legislation, it appears that, except as expressly modified by statute, Bell's contractual obligations with Western Union are governed by common law and can be changed or modified only in accordance with the procedures set forth in the contracts or the Communications Act. . . . [I]t is clear that neither common law nor the Act authorizes Bell unilaterally to alter its contracts with Western Union.

In other words, the *Sierra-Mobile* doctrine "restricts federal agencies from permitting regulatees to unilaterally abrogate their private contracts by filing tariffs altering the terms of those contracts."[32/]

Although the Common Carrier Bureau opined in the Suspension Order in this proceeding that the *Sierra-Mobile* doctrine does not apply to contract-based arrangements that are filed and made generally available,[33/] TRA has argued in its Comments filed September

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30/ United Gas Co. v. Mobile Gas Corp., 350 U.S. 332, 339 (1956) (construing Natural Gas Act); Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348 (1956) (construing Federal Power Act); MCI Telecommunications Corp. v. FCC, 712 F.2d 517, 535 n.27 (D.C. Cir. 1983); Bell Telephone Company of Pennsylvania v. FCC, 503 F.2d 1250, 1282 (3d Cir. 1974) ("Bell Telephone"), cert. denied, 422 U.S. 1026, reh. den., 423 U.S. 886 (1975) (construing Communications Act).

31/ (Docket 19896), 46 F.C.C.2d 413, 432 (1974), aff'd, Bell Telephone, *supra*, note 30.

32/ MCI Telecommunications Corp. v. FCC, 665 F.2d 1300, 1302 (D.C. Cir. 1981) ("MCI").

33/ AT&T Communications Contract Tariff No. 360 - Transmittal No. CT 3076, CC Dkt. No. 95-80 (released June 5, 1995) at ¶ 11.